# CROSS-BORDER INSOLVENCY: IS EAST AFRICA READY?

## ***Background***

More often than not, when you walk into a shop or supermarket and pick up an article, it will clearly confirm that it is made or assembled in China, England, Kenya and so on. This is indicative of international trade.

Every country is endowed with different resources and each has a peculiar comparative advantage over the other. It therefore goes without saying that no country is completely self-reliant.

This realization drives corporate entities to pursue opportunities in multiple markets and setting up operations in two or more countries in a bid to survive in today's competitive market economy particularly where the new markets boast of high demand or cheaper sources of raw materials and labour. Uganda today has numerous corporations with operations, assets and liabilities across several states. This is evident in the banking sector, insurance sector, and the fast moving consumer goods among others.

As is the case with the growth of competition in liberalized markets, along with the expansion of operations across borders, comes the inevitable winding up and liquidation of entities (both local and foreign), depending on the prevailing market factors. This increasingly raises issues of cross border insolvency and the question that arises then is whether East Africa as a region is ready to deal with this new concept.

## ***Existing Legal Framework: The UNCITRAL Law on Cross-border Insolvency***

Since legal systems generally vary from state to state, there are inevitable glaring differences in the substantive and procedural legal regimes of those states. This would be bound to frustrate the set up and coordination of a cross border insolvency practice as it becomes too bureaucratic and costly to satisfy the legal requirements in each state.

The UN General Assembly, in an attempt to address the inefficacies of the uncoordinated approaches to cross border insolvency, in December 1997 endorsed the United Nations Commission on International Trade Law (UNCITRAL) Model Law on cross border insolvency. These rules are internationally recognized and accepted as guidelines on cross border insolvency.

The Model Law does not seek to unify substantive insolvency law, but it rather focuses on encouraging cooperation and coordination between jurisdictions. The Model Law is based on four key principles that include: (i) access to the courts of a foreign state to seek assistance and authorize representatives of local proceedings being conducted in the enacting state to seek assistance elsewhere; (ii) simplified procedures for recognition of qualifying foreign representatives, proceedings and orders; (iii) relief considered necessary for the orderly and fair conduct of cross-border insolvencies to assist foreign proceedings including interim relief; and (iv) cooperation among the courts of states where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor.

***Challenges associated with Cross-border Insolvency.***

The Model Law is not prescriptive but is rather a guide to what modern cross border legal regimes should strive to achieve. There is therefore no obligation upon states to adopt the guidelines as is the case with some treaties and other international agreements. Uganda has been a pacesetter in the East African region to incorporate the Model Law in its substantive legal regime. Part IX of the Insolvency Act 2011 elaborately provides for cross border insolvency in line with the Model Law.

Kenya has followed suit and made provision for the Model Law particularly under Section 720 of the Kenyan Insolvency Act 2015, which provides that the Model Law on Cross-Border Insolvency has the force of law in Kenya in the form set out in the Fifth Schedule.

The rest of the East African states are yet to adopt the Model Law, which effectively undermines the proposed pathway to an integrated and coordinated approach to cross border insolvency in the region.

***Does this mean that currently, only Uganda and Kenya can have a cross border insolvency practice between themselves?***

Unfortunately despite the steps taken by Uganda and Kenya as discussed above, coordinated cross border insolvency as envisaged by the Model Law is not yet possible even between the two states. This is because the synchronization of the two legal regimes is still under consideration by stakeholders and yet to be completed.

Section 212 of the Ugandan Insolvency Act 2011, provides that, where the Minister is satisfied that any State, has enacted laws for reciprocity in bankruptcy/insolvency which have the same effect as Part IX, then the Minister may by Statutory Instrument declare such a state to be a reciprocating State and any court having jurisdiction in bankruptcy/insolvency will be a reciprocating court for purposes of the Insolvency Act 2011.

In the same vein, Section 225(3) of the Ugandan Insolvency Act 2011, provides that Cross Border Insolvency Rules shall not come into force until the Chief Justice by statutory instrument declares that the reciprocating state has similar rules. Currently, the Ugandan and Kenyan cross border insolvency rules are pending finalization.

This effectively means that in order for Uganda and Kenya to have a coordinated cross border insolvency practice, it is not enough that both Uganda and Kenya have incorporated the Model Law in their respective insolvency legislations, but that enabling regulations must be passed by the line Minister in Uganda under a Statutory Instrument, declaring Kenya a reciprocating state.

***The Way Forward***

As noted above, a coordinated cross border insolvency practice in East Africa is only possible where there is an underlying enabling reciprocal cross border insolvency legal regime in each of the member states. Considering that a country's biggest trade partner is usually a neighbouring state, it is imperative that the rest of the East African states that have not yet incorporated the Model law in their insolvency legal regimes should accelerate efforts to do so. This will improve the ease of doing business in the region and in turn fast track efforts towards regional integration and economic development. Investors will also have legal certainty on cross border trade and insolvency proceedings in the region.

In the meantime, all hope is not lost for a creditor in one state who has obtained judgment against an insolvent company that has assets in other states. For example in Uganda such a creditor may still proceed to satisfy his or her judgment by virtue of *The Foreign Judgments (Reciprocal Enforcement) Act Cap 9, The Judgment Extension Act Cap 12* and *The Reciprocal Enforcement of Judgments Act Cap 21.* While these laws may offer some assistance, they also have their own inherent deficiencies for instance the requirement for reciprocal arrangements between states, for purposes of enforceability of the judgments. Furthermore, The Judgment Extension Act only applies to judgments from Malawi, Kenya and Tanzania leaving out other members of the EAC such as Rwanda and Burundi.

Judges may also further explore the principle of comity which refers to the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[1]

[1] Hilton v Guyot 159 US 113 (1895)

The principle of comity has been tested in Uganda in *Christopher Sales and Carol Sales v Attorney General,*[2]where the question raised was whether a judgment creditor 'stranded' with a judgment from a country with no reciprocal arrangements with Uganda could enforce that judgment. It was held that a judgment creditor armed with such a judgment should be allowed to realise the fruits of his judgment and should be afforded recognition by Ugandan courts even in the absence of a reciprocal arrangement. One must however appreciate that for the principle of comity to firmly take root in the region, it would take unprecedented levels of judicial activism as was the case in *the Christopher Sales case*.

What the future holds for cross border insolvency practice in East Africa may be determined by an application that is currently before the Ugandan courts in which administrators appointed in Kenya in respect to a Kenyan company are seeking recognition of the administration proceedings in Uganda where the company also has a branch and assets. Cross border insolvency is now growing at an unprecedented rate more than ever before. There is therefore need for legal certainty even in the absence of reciprocity.

Based on our research, it is safe to say that East Africa is currently not yet ready for a coordinated cross border insolvency practice. As we move towards full economic integration of the East African Community, there is a need for administrative reforms by all member states to address the challenges posed by cross border insolvency. The joint steps towards this common goal were evident at a workshop hosted by the Uganda Registration Services Bureau in Kampala that was well attended by several regulators in the region. It was noted that the adoption of the Model Law in the domestic legal regimes of member states is a good start but it is not a magic wand that in itself that takes care of all the difficulties associated with cross border insolvency. There has to be cooperation and communication of interests between courts of the various states and between insolvency practitioners as well as judicial activism and continuous capacity building through training of cross border insolvency stakeholders.

[2] Civil Suit No.91 of 2011